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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent, v. MATTHEW ALAN LAWRIE, Defendant and Appellant.	D050998 (Super. Ct. No. SCN160404)

APPEAL from a judgment of the Superior Court of San Diego County, Marguerite L. Wagner, Judge. Affirmed.

A jury convicted Matthew Alan Lawrie of first degree murder (Pen. Code, § 187, subd. (a)) and found true an enhancement that he personally and intentionally discharged a firearm causing a person's death. (Pen. Code, § 12022.53, subd. (d).) The trial court sentenced him to an indeterminate prison term of 50 years to life.

Lawrie contends the trial court violated his state and federal due process rights by admitting into evidence: (1) testimony regarding a pretext telephone call made to his cell

phone; (2) Lawrie's writings expressing threats against the victim — his mother, Claudia Boehmer (Boehmer) — and her family; and (3) testimony identifying Lawrie's truck seen leaving the murder scene. We affirm.

FACTUAL BACKGROUND

George Boehmer, the victim's husband, testified that in February 2003 — approximately six weeks before Claudia Boehmer (Lawrie's mother) was murdered — Lawrie left a threatening telephone message for her on the answering machine in their Fallbrook home. The message stated at the end, "Do I have to come up there" — "Do I have to drag you around San Diego by the hair until you show me where my son is?"

On March 21, 2003, approximately one week before her murder, Lawrie telephoned his mother and left a voice message stating, "I'm calling um, to ask where my son is. . . . Mom, get off your ass and get my kid. Be a mother. Act like a mother instead of the other type of a mother, which goes with the word mother fucker. Get my kid. I wanna see him now. You got forty-eight hours."

Melissa Caul, the office manager at Lawrie & Company, testified that on the day of Boehmer's murder, March 28, 2003, at approximately 1:50 p.m., she saw Lawrie in the company parking lot on Candida Street in San Diego. Caul immediately ensured the doors of the building were locked, and she called the police. Lawrie looked in the building and soon left. His pickup truck had on it a "for sale" sign. At approximately 2:10 p.m., Caul telephoned Boehmer and requested some information. At approximately 2:35 p.m., Boehmer telephoned Caul.

Nisa Webster testified she and Lawrie have a son, Zachary, who was born in March 2000. She had custody of Zachary, and Lawrie was allowed supervised visits within a supervision facility four hours a week. Webster and Boehmer visited almost weekly, and Boehmer paid the fees for Webster's family law attorney. On March 28, 2003, Webster and Boehmer spoke by telephone regarding possible changes to the visitation order, and Boehmer told her, "over my dead body will "[Lawrie] get unsupervised visits with [Zachary]." Webster and Boehmer spoke again at approximately 2:16 p.m. that day, and Boehmer stated she was going to speak to Webster's attorney and have him call Webster. Boehmer never called back.

At approximately 2:40 p.m., Boehmer telephoned her daughter, Yvonne Rodriguez. Boehmer sounded shaky and frightened and told Rodriguez she had just received a telephone call from Lawrie, who told her "show me where my son is or else." Rodriguez demanded that her mother hang up immediately and get her telephone blocked so she could no longer receive calls from Lawrie. Records of Lawrie's cell phone calls show that he was in the Fallbrook area around 2:56 p.m. that day.

At approximately 3:05 p.m., Raymond Duarte, a landscaper for Boehmer's neighbors, was outdoors and heard a gunshot. Duarte went over to calm a horse who was running back and forth. About one minute later, Duarte heard a vehicle accelerate, and saw a pickup truck with a "for sale" sign on it speeding from Boehmer's driveway to the main road. The next day, after Duarte learned Boehmer was killed, he telephoned the police, who took his report.

Daryl Veltrano, Boehmer's neighbor, was riding his bicycle that afternoon. Veltrano was familiar with Duarte's truck and saw Duarte working with the horses. A different truck than Duarte's passed him and drove into Boehmer's driveway. Veltrano went inside his home to have a drink, returned outside and rode his bike again. He heard what sounded like a gunshot.

Between 4:00 and 5:00 p.m., Lawrie went to the law office where Linda Martinez worked as a receptionist. He had alcohol on his breath, was pushy, and demanded to speak to a certain attorney, who was unavailable.

Between 4:30 and 7:00 p.m., Lawrie telephoned Jesus Rodriguez, owner of Ruben's Automotive, saying he had parked his pickup truck near Rodriguez's business and telling Jesus to sell the pickup. The police later retrieved Lawrie's truck from that shop.

An autopsy showed Boehmer died from a gunshot wound to the head fired from an intermediate range. The medical examiner testified Boehmer likely was seated when she was shot. A San Diego County homicide detective testified there was no sign of forced entry into Boehmer's home; it was not ransacked; and, there was no sign that items were missing.

A firearms analyst testified that a bullet recovered from the crime scene was a .38-caliber bullet, which can be fired primarily by .38-caliber specials or .357-caliber magnum revolvers. Robert Miller, Lawrie's uncle, testified that approximately two years before Boehmer's death he had visited Lawrie's apartment and seen a .357-caliber revolver Lawrie owned.

Yvonne Rodriguez testified that on March 31, 2003, the police instructed her to make a pretext telephone call to Lawrie's cell phone. Rodriguez did so, but Lawrie did not answer. Rodriguez, in a voicemail message, "vehemently" accused him of murdering their mother. The police asked Rodriguez to make a second pretext call and to leave a callback telephone number. Rodriguez complied. Lawrie did not return Rodriguez's calls.

Joshua Dean testified for the defense that on May 19, 2006 — three days before his trial testimony — he was interviewed for the first time regarding his activities on March 8, 2003. He testified that on the day Boehmer was murdered, he was repairing Lawrie's boat at the Mission Bay Marina. At approximately 4:30 p.m. that day, he and Lawrie had beers on Lawrie's boat.

DISCUSSION

I.

Lawrie contends the trial court committed prejudicial error and violated his due process rights by admitting into evidence Yvonne Rodriguez's testimony regarding her pretext calls, because that issue was irrelevant under Evidence Code section 210.[1]

"The principles governing the admission of evidence are well settled. Only relevant evidence is admissible [citation], 'and all relevant evidence is admissible unless excluded under the federal or state Constitutions or by statute. [Citations.]' [Citation.] 'The test of relevance is whether the evidence tends "logically, naturally, and by

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1 All further statutory references are to the Evidence Code unless otherwise stated.

reasonable inference" to establish material facts such as identity, intent, or motive.' " (*People v. Harris* (2005) 37 Cal.4th 310, 337.) An appellate court applies the abuse of discretion standard of review to any ruling by a trial court on the admissibility of evidence. (*People v. Waidla* (2000) 22 Cal.4th 690, 725.)

"We will not overturn or disturb a trial court's exercise of discretion under section 352 in the absence of manifest abuse, upon a finding that its decision was palpably arbitrary, capricious and patently absurd." (*People v. Jennings* (2000) 81 Cal.App.4th 1301, 1314.)

Here, the people filed a motion in limine requesting that the trial court admit into evidence Rodriguez's testimony regarding the pretext calls.[2] The People argued the testimony was admissible for two independent nonhearsay reasons: first, "the phone records indicate that the VERY LAST call ever received by [Lawrie's] cell phone OR ever made to [his] cell phone was the call to voicemail after the pretext messages had been left by [Rodriguez]. Immediately after accessing voicemail containing those accusatory messages, the cell phone ceased to be used AT ALL. Even standing by themselves, these facts have at least *some* 'tendency in reason to prove or disprove any disputed fact' of consequence, the only requirement of relevance under Evidence Code

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2 The record does not include a transcript of the pretext call, but based on comments at the hearing on the motion, we gather that in the call, Rodriguez referred to Lawrie several times as "a sick fuck" and a "motherfucker;" and stated he "was toast." Rodriguez also made the following statements: "you killed our mother;" "everyone thinks you did it;" "so help me God if you come after me or anybody else;" "We're going to get you if you come back to town;" "I'm going to do everything I can to make sure you never see your son again. You'll never get your money. You're so busted."

section 210." Second, "the People request the Court to admit the calls and the subsequent lack of any response under Evidence Code section 1221, commonly referred to as the adoptive admission exception to the hearsay rule."

At a hearing on the motion, the trial court agreed with the prosecution's first theory, and rejected the second. The court ruled, "I want [Rodriguez's testimony] restricted to . . . 'and you made an accusation during that phone call that your brother had killed your mother,' something like that." The following exchange took place:

"[Defense Counsel]: So your ruling is that you're going to allow her accusations of the defendant committing murder for a limited purpose. The jury is not going to be able to separate —

"The Court: I will admonish them. I see the relevance.

"[Defense Counsel]: . . . It's such a complex legal maneuver to separate the accusations for such a limited purpose, they are not going to be able to perform those mental gymnastics during deliberations. They are going to forget that limiting instruction. They are not going to be able to do it. [¶] I think it's wrong to admit the accusations, given the venomous threats [Rodriguez] made. [Lawrie] had every right not to return that phone call.

"The Court: We're not going to let [the prosecutor] argue that. I'm not going to let him argue that it's an adoptive admission. I'm not going to let him. I'm not going to give that jury instruction.

"[Defense Counsel]: But they are still going to think that it is.

"The Court: I don't know what they are going to think, but you certainly have the right to argue that. We're sanitizing it to the point of 'you accused your brother of murdering your mother, correct,' and that's it. That's all [the prosecutor] gets to say." The prosecutor proceeded with direct examination of Rodriguez in accord with the court's order.

Lawrie contends the pretext calls were not adoptive admissions. The trial court agreed and ruled, "I don't find that it's an adoptive admission. I find, under [section] 352, that to let it in would be very damaging, in that it does contain the numerous threats, it does contain the statement that everyone believes he committed the murder. I don't think that it should come in. Therefore, it will not." The court forbade the prosecutor from arguing regarding adoptive admission, and the prosecutor complied with that ruling.

The court instructed the jury as follows: "During the trial, certain evidence was admitted for a limited purpose. You may consider the evidence only for that purpose and for no other." Lawrie contends, "[T]he court did not relate this instruction to the pretext call evidence or otherwise give a limiting instruction regarding this evidence." Lawrie further contends that "the trial court exacerbated its error in admitting the pretext call evidence when, despite its representations to counsel, it failed to admonish the jury not to consider this evidence for its truth or as indicative of [his] consciousness of guilt."

Since the trial court concluded the pretext calls were not adoptive admissions, we are puzzled why the testimony was admitted at all. We conclude any error in admitting the pretext calls into evidence was harmless beyond a reasonable doubt under the standard set forth in *Chapman v. California* (1967) 386 U.S. 18 (*Chapman*). The trial

evidence strongly supported the conviction. Lawrie had a motive to murder his mother, who he perceived as helping Nisa Webster to limit his access to his son. He had threatened his mother on more than one occasion, including in a phone call minutes before he murdered her. Melissa Caul saw Lawrie's truck with the "for sale" sign approximately one hour before the murder. Duarte and Veltrano saw Lawrie's pickup truck at Boehmer's residence on the day she was murdered, and they heard a gunshot ring out while his truck was at her house. Records of Lawrie's cell phone use showed he was in the Fallbrook area around the time his pickup was seen there.

II.

Lawrie contends the trial court erred in admitting into evidence a letter and three postcard messages he wrote because they were highly prejudicial under sections 352 and 1101, subd. (a) and therefore he was deprived of his constitutional right to due process.

It is important to keep in mind what the concept of "undue prejudice" means in the context of section 352. " 'Prejudice' as contemplated by section 352 is not so sweeping as to include any evidence the opponent finds inconvenient. Evidence is not prejudicial, as that term is used in a section 352 context, merely because it undermines the opponent's position or shores up that of the proponent. The ability to do so is what makes evidence relevant. The code speaks in terms of *undue* prejudice. . . . ' "The 'prejudice' referred to in Evidence Code section 352 applies to evidence which uniquely tends to evoke an emotional bias against the defendant as an individual and which has very little effect on the issues. In applying section 352, 'prejudicial' is not synonymous with 'damaging.' " [Citation.]' [¶] The prejudice that section 352 ' "is designed to avoid is not the prejudice

or damage to a defense that naturally flows from relevant, highly probative evidence." [Citations.] "Rather, the statute uses the word in its etymological sense of 'prejudging' a person or cause on the basis of extraneous factors. [Citation.]" [Citation.]' . . . In other words, evidence should be excluded as unduly prejudicial when it is of such nature as to inflame the emotions of the jury, motivating them to use the information, not to logically evaluate the point upon which it is relevant, but to reward or punish one side because of the jurors' emotional reaction. In such a circumstance, the evidence is unduly prejudicial because of the substantial likelihood the jury will use it for an illegitimate purpose." (*Vorse v. Sarasy* (1997) 53 Cal.App.4th 998, 1008-1009.)

Between May 2000 and March 2001, when Nisa Webster and Zachary had stopped staying with Lawrie, and were living with Alice Miller, Lawrie sent a letter to Alice Miller, who was Boehmer's mother and his grandmother. The letter stated, "I hold the keys to all Millers who wish to go to heaven. Your souls are mine, and your names have been erased from the book of life for eternity." Lawrie filed a motion in limine to exclude the letter from evidence, arguing it was sent three years before his mother was killed; addressed to his grandmother and not his mother; and, it was not a death threat but rather "a statement that the people are not going to be going to heaven." The trial court ruled the letter was relevant as an admission under section 1101, subdivision (b).

The people filed a motion in limine to admit into evidence three postcards on which Lawrie wrote messages in the period between mid-July 2001 and March 2003. The postcards had images from Bali, but were not mailed to anyone. The first postcard was addressed to Lawrie & Co. Inc. and had this handwritten message, "A little rhyme

w/ Bali kick. Hey, what the Hello. JOKE is on me. Where's my cut, of Lawrie & Company. Yeah Right I'll see it in the End. Love ya Dad. PS I sure need you! ML"

The second postcard had an image of a temple and on the back this handwritten message: "This is a temple where they sacrificed virgins. I'm no virgin But why the Hell are you Sacrificing me? I'm in paradise now. You have Shown your true colors. Mom you Should Be Put Down Like a Rabid Bitch Dog that you are Fuck you George[.]"[3]

The third postcard had an image of an Indonesian "war god." Lawrie addressed the postcard to "Miller's Loser's [*sic*]" and wrote on it, "Picked this Little guy up in Indonesia, while Seeing My Fiance. I thought about the Miller Family and All your Little Lies & Secrets. Say Hi to your friend, you'll be w/Him in Hell!. OH By the way I

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3 Outside of the presence of the jury, the prosecutor explained the relevance of the timeframe as follows: "The key event in this case . . . was the birth of the baby, Zack, the Defendant's so, to Nisa in March of 2000. At approximately two months old, Zack was taken from [Lawrie] by Nisa and by Grandma Alice, the Defendant's grandmother, one of the Millers, to live at the Miller household. [¶] [Lawrie] was permitted minimal visitation, was essentially locked in the home when doing that visitation, and then the visitation was upped from there to require supervised visitation. Then by June of 2001, in fact, Nisa had gone to court and obtained full custody and the requirement for court-ordered supervision for any visitation to take place. [¶] It is in that context that he then goes in July, 2001, to Indonesia. . . . [¶] However, this postcard goes to mental state, and it's being offered for a number of purposes, one of which is nonhearsay. . . . [¶] It is also being offered pursuant to Evidence Code section 1250, that being for early evidence of the defendant's then existing mental state about who it is he blames for his problems with his child, who it is he blames for his problems with this visitation situation with his child and how it is he believes that should be dealt with, which in this case is violently. [¶] These are not random threats. They are in the context of what led to his homicide, and they begin showing how this was not a violent snap of reality, not a heat of passion. This was a series of events over which time the defendant harbored the same intent, the same malice aforethought and the same premeditation and an indication of whom the victim would be and the identity of the killer."

haven't even Begun to War on you all. You should Really Stop Now Please Turn yourselves in[.]"

At trial, Lawrie objected to the introduction into evidence of these postcards, arguing that his statements were remote in time, not threats, and barred under section 352. The court ruled the postcards were not prejudicial, but probative of the building anger Lawrie had for his family members, and especially his mother, who Lawrie believed was conspiring with Nisa Webster to deny him opportunities to see his son.

We conclude the letters and postcards were admissible as admissions of a party under section 1220. The statements were relevant regarding Lawrie's state of mind in a critical period following the birth of his son, and of his attitude towards his mother and her family. The trial court conducted an analysis under section 352, and we agree with its finding that this evidence was more probative than prejudicial. At any rate, for the reasons we stated above, any error was harmless beyond a reasonable doubt even under the stricter *Chapman* standard. (*Chapman*, *supra*, 386 U.S. 18.)

III.

Lawrie contends the trial court committed prejudicial error and violated his state and federal constitutional right to due process when it did not suppress evidence regarding Raymond Duarte's identification of Lawrie's pickup truck as the vehicle he saw leaving the crime scene. Moreover, Lawrie contends, "this court should not only recognize a defendant's right to a line-up with regard to inanimate objects, but also that the identification procedure employed in this case violated Mr. Lawrie's right to due process." We decline the invitation.

In a motion in limine, the defense explained that Duarte claimed he saw Lawrie's truck on the day Boehmer was murdered. On April 2, 2003, the police showed Duarte two photographs of the same vehicle. According to the police report, "[The photographs] appeared to have been taken under low light conditions and they are of rather poor quality." Duarte told the police he did not believe the truck in the photos was the same truck he saw leaving the Boehmer's home. On April 9, 2003, the police took Duarte to view Lawrie's pickup. On a scale of one to ten, "with ten being absolutely positive," Duarte calculated as an "8" his certainty that Lawrie's pickup was the one he saw leaving the crime scene.

Lawrie contended Duarte "was shown only two pictures, both of the same vehicle, [Lawrie's] truck." Moreover, on April 9, 2003, "the detective once again only showed Mr. Duarte the one truck, that of Mr. Lawrie's." Accordingly, Lawrie concluded his truck "was identified by [Duarte] at a pretrial confrontation that was so unnecessarily suggestive and conducive to irreparable mistaken identification that [Lawrie] was denied due process of law." The court denied the motion, stating, "As the People pointed out, there is no case that I know of nor that has been cited by the defense as to [lineups of] inanimate objects."

The trial court was correct. This issue of the possible suggestiveness of a vehicle identification was raised in *People v. Edwards* (1981) 126 Cal.App.3d 447, and the court ruled, "That novel contention is eristic. The due process proscription against impermissibly suggestive identification procedures relates to the identification of people — not physical evidence. We have not been cited to a single case in California applying

that proscription to the identification of pieces of physical evidence and our independent research has revealed none." (*Id.* at p. 880.) The *Edwards* court added, "We also hold that the identification of physical evidence by a witness is not suppressible under the *Simmons* rubric [*Simmons v. United States* (1968) 390 U.S. 377, 384], upon the ground that the '. . . procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification.' Instead, the trustworthiness of that identification testimony is to be tested, like other evidence discovered during a criminal investigation, by cross-examination, impeachment and argument."[4] (*Edwards, supra,* at p. 881.) Here, defense counsel cross-examined Duarte extensively regarding his identification of Lawrie's pickup truck, and during closing argument challenged the reliability of his testimony.

At any rate, for the reasons we outlined above, any error in admitting evidence regarding Duarte's identification was harmless beyond a reasonable doubt under *Chapman*. (*Chapman, supra,* 386 U.S. 18.)

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4 The parties' briefs cite to out-of-state cases that reach the same conclusion.

DISPOSITION

The judgment is affirmed.

O'ROURKE, J.

WE CONCUR:

McCONNELL, P. J.

AARON, J.